Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

MICHAEL A. SCOTT, *pro se*
TERRY A. SCOTT, *pro se*

Petitioners

v.

SAMUEL I. WHITE, P.C., et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

The trial court dismissed this case against the Scotts finding that they were in violation of an order rendered in a criminal/civil contempt proceeding only against Michael Scott by the Circuit Court of the City of Norfolk, Virginia ("October order") for filing this case in violation of an earlier pre-filing injunction that court entered against him on July 2, 2001 ("2001 order"). Mrs. Terry A. Scott was not a party to the contempt proceeding or the earlier 2001 proceeding from which the 2001 order was rendered. Mrs. Scott was not named in the October order that the trial court ruled the Scotts had violated. The trial court did not give notice or opportunity to be heard to the Scotts or to 3 of the defendants over whom it never acquired personal jurisdiction (but on whose behalf it dismissed the case) that it was considering finding the Scotts in violation of the October order prior to its *sua sponte* dismissal for that reason. The Scotts contend, however, that the sanctions imposed against Scott in the October order were criminal, not civil, in nature as the Norfolk Court concluded.

1. Did the trial court's *sua sponte* finding that the Scotts were in violation of the October order, and dismissal of this case on that basis without notice or opportunity for a hearing to them, violate their due process and equal protection rights under the Fourteenth Amendment?

2. Did the trial court's reliance on the October order as the basis for dismissing the instant case against both Scotts impermissibly enforce criminal sanctions against the Scotts in violation of their due process and equal protection rights under the Fourteenth Amendment?

3. Did Michael Scott have a vested right and or protected property interest in the October order entitling him to take the action he was ordered to take, and if so, did he have a protected property interest given under Virginia statute to dismiss his case by nonsuit and was he deprived of that property interest in violation of his due process and equal protection rights under the Fourteenth Amendment?

4. Did the trial court err in enforcing against petitioner Mrs. Terry A. Scott in this case the October order to which she was not a party and was not named in or subject to the underlying 2001 order that was the basis for the contempt proceeding, and did the trial court deprive her of the due process and equal protection guaranteed by the Fourteenth Amendment and of her First Amendment right to petition the trial court with her grievance?

5. Did the trial court have the power in equity to dismiss the Scotts' case against (but favorable to) defendants over whom it never acquired personal jurisdiction and did not participate

in the contempt proceedings against Michael Scott, and was the October order on which the trial court relied unconstitutionally vague, ambiguous and overly broad?

6. Did the Scotts have a protected property interest in certain of the respondents' statutory default in the trial court that accrued while those respondents pursued the contempt citation against Michael Scott, and if so, were the Scotts deprived of that interest in violation of their due process and equal protection rights under the Fourteenth Amendment?

LIST OF PARTIES

A. The Names Of The Petitioners

MICHAEL A. SCOTT
TERRY A. SCOTT

B. The Names Of The Repondents

SAMUEL I. WHITE, P.C.
US BANK, NA
DLJ MORTGAGE CAPITAL, INC.
GE MORTGAGE SERVICES, LLC
WELLS FARGO BANK, NA
WELLS FARGO HOME MORTGAGE, INC.
MERS CORPORATION, INC.
PRIME EQUITY, LLC
EDWARD BARCLIFF, JR.
JASON HAMLIN

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OPINIONS BELOW

The Supreme Court of Virginia entered an order denying the Scotts' petition for rehearing on November 12, 2009. (App. 1). The Supreme Court of Virginia entered an order denying the Scotts' petition for appeal on July 28, 2009. (App. 2). The Circuit Court of the City of Virginia Beach, Virginia entered a final order dismissing the Scotts' case with prejudice on February 25, 2009. (App. 3-5).

JURISDICTION STATEMENT

Pursuant to Supreme Court Rule 10 and 28 U.S.C. § 1257(a), petitioners petition for writ of certiorari to the Supreme Court of Virginia because that Court, in finding no reversible error with the trial court's final order, and the trial court have made rulings that are repugnant to the First Amendment and Fourteenth Amendment and the petitioners' rights there under.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, U. S. Const. Amend. XIV, which states, in relevant part:

> "No...State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

First Amendment, U. S. Const. Amend. I, which states, in relevant part:

"Congress shall make no law...prohibiting...the right of the people...to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

On July 2, 2001, petitioner Michael A. Scott ("Scott") was enjoined by order of the Circuit Court of the City of Norfolk, Virginia ("2001 order") from making any filings whatsoever in the courts of the Commonwealth of Virginia without first obtaining permission from that Court. (App. 6-8). On or about June 9, 2008, Scott and his wife, petitioner Terry A. Scott ("Mrs. Scott") jointly filed the instant case.

This case concerned two pieces of real estate they once owned at 4753 Longmont Road, Virginia Beach, Virginia 23456 ("Longmont Road property") and at 602 Zephyr Court, Virginia Beach, Virginia 23462 ("Zephyr property"). Both properties were supposedly foreclosed, the former in February 2008 and the latter in July 2003. In this case with regards to the Longmont Road property, both Scotts joined in the filing of that claim, but with regards to the Zephyr property, only Mrs. Scott filed that claim in this case as separately set out in the complaint. (App. 9-38).

In the complaint, the Scotts jointly sued respondents Samuel I. White, P.C., US Bank, NA, Wells Fargo Bank, NA, Wells Fargo Home Mortgage, Inc., DLJ Mortgage Capital, Inc., MERS Corporation, Inc. (fka Mortgage Electronic

Registration Systems, Inc.) and Jason Hamlin (excluding MERS, herein referred to as "interveners") regarding the Longmont Road property. Mrs. Scott only sued Samuel I. White, P.C., Wells Fargo Home Mortgage, Inc., GE Mortgage Services, LLC, Prime Equity, LLC and Edward Barcliff, Jr. regarding the Zephyr property. The trial court never acquired personal jurisdiction over MERS, Prime Equity or Mr. Barcliff, but the trial court dismissed the case against them as well.

Shortly after the filing of this case, the Scotts' sought injunctive relief in the trial court seeking to enjoin an unlawful detainer action US Bank, NA filed against them in the Virginia Beach General District Court. The interveners appeared on July 8, 2008 and successfully contested the Scotts' request for injunctive relief. Samuel I. White, P.C. and Mr. Hamlin did file a motion to dismiss in the trial court. The corporate interveners invoked the jurisdiction of the trial court again when they filed discovery objections in August 2008.

Contending that Scott violated the 2001 order, rather than file responsive pleadings to the suit filed in this case, the interveners sought intervention in the Norfolk Circuit Court ("Norfolk Court") case from which the 2001 order arose. The Norfolk Court conducted civil and criminal contempt proceedings against Scott, but only found him in civil contempt by the October order (App. 39-43). Mrs. Scott was not a party to or participant in the contempt proceedings and received no notice of them. The Norfolk Court imposed in excess of $40,000 in attorney's fees against Scott and ordered him to

dismiss "all matters filed by him" in the Virginia Beach Circuit Court and to withdraw any affirmative requests for relief he made in the unlawful detainer action US Bank, NA filed against the Scotts in the Virginia Beach General District Court and to withdraw his objections to foreclosure accounting made with the Commissioner of Accounts of Virginia Beach. Attempting to comply with the October order in this matter, Scott filed a motion in the trial court seeking to nonsuit this case pursuant to Virginia Code § 8.01-380. Dissatisfied with Scott's attempt to dismiss the case "filed by him," the petitioners, except MERS, Prime Equity and Mr. Barcliff, nearly two months after the October order was issued filed an objection to Scott's motion for nonsuit seeking instead dismissal of the entire case against the Scotts.

The trial court granted the motion to dismiss and dismissed the entire case, not only against the defendants who appeared, but against those defendants over whom it never acquired personal jurisdiction in this case. The trial court in its final act and final order specifically found that it was the intent of the October order to apply to both Scotts and found that both Scotts were in violation of that order in this case, notwithstanding that Scott was attempting to comply with the October order with his motion for nonsuit.

In response to the objection made to Scott's motion for nonsuit, the Scotts raised issues regarding due process, equal protection and court petitioning rights. The trial court essentially ignored the Scotts' constitutional arguments and

dismissed the case. In their petition for appeal, Questions Presented 1, 3, and 5 through 8, the Scotts raised in the Supreme Court of Virginia the same due process, equal protection and court petitioning rights ignored by the trial court. Because it was the final act of the trial court which violated the Scotts' constitutional rights, they raised in certain of the aforementioned questions additional issues regarding denial of constitutional due process, equal protection and court petitioning rights by the trial court. Because the Scotts believed that the Supreme Court of Virginia failed and refused to apply its own precedent and the precedent of this Court in this case, the Scotts' raised in their petition for rehearing constitutional due process, equal protection and court petitioning rights based on that Court's actions. The Supreme Court of Virginia found no error with the trial court's actions, and apparently no error with its own actions, and denied the Scotts' petition and petition for rehearing without opinion.

REASONS FOR GRANTING THE PETITION

The petition should be granted because the courts of the Commonwealth of Virginia, especially the trial court's final actions taken *sua sponte,* have violated the Scotts rights protected by the First Amendment and Fourteenth Amendment and in so doing enforced criminal sanctions upon which was based the courts' rulings and orders that are contrary to the First Amendment, Fourteenth Amendment and the jurisprudence of this Court; and that are in conflict with similar jurisprudence of the federal courts of appeal and of the jurisprudence of other state supreme courts. The 2001 order on

which the contempt proceedings were based was void and violated the due process clause of the Fourteenth Amendment and was a prior restraint that violated the First Amendment and, therefore, should not have led to the civil contempt conviction and dismissal of this case.

The Scotts have been denied due process and equal protection and the right to petition the state court by the state's courts. It is the conduct of the state's courts that has fouled the First Amendment and the Fourteenth Amendment and the Scotts protected rights there under. *See Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) (private party deprivation has been judicially enforced). This is the only federal forum in which the Scotts could seek protection of their federal constitutional rights in this case.

Notwithstanding the Norfolk Court's characterization of the contempt finding against Scott as civil contempt in the October order, the relief ordered was criminal and punitive in nature under well-settled jurisprudence of this Court. Because the relief was punitive, the trial court's reliance on the October order as the basis for dismissing this case, especially against Mrs. Scott, as its final action denied the Scotts due process and equal protection.

Mrs. Scott was not prohibited by any order, but especially the 2001 order, from filing this case. She was not given notice of the contempt proceedings and did not participate in them. The trial court gave her no notice that it was

contemplating expanding the October order (which did not name Mrs. Scott) to bar her from pursuing her interests in this case. And yet, in the final action of the trial court, it announced for the first time that it was the intent of the October order to preclude her case and that she and Scott were in violation of that order without notice and opportunity to be heard given to either of them before making that ruling and sanctioning them by dismissing this case.

The trial court dismissed this case against all defendants, including those 3 over whom it never acquired personal jurisdiction under its equity jurisdiction. This action fouled well-settled principles of law that a court cannot render a valid judgment in equity unless it has acquired personal jurisdiction over all of the parties whose rights were affected by the judgment. The defendants', MERS, Prime Equity and Mr. Barcliff, rights were affected by the trial court's final order. Mrs. Scott's rights were affected by the October order, ***as expressly and only found by the trial court,*** when she was not named in the order and did not participate in the contempt proceeding. In either instance, the Scotts were denied due process and equal protection under the Fourteenth Amendment.

Point 1 The October Order Imposed Criminal Penalties That Were Impermissibly Enforced

The October order in which the Norfolk Court found Scott to be in civil contempt ordered against him the following relief stating, in part:

- "that within five (5) days of the date of entry of this Order Scott shall dismiss all matters filed by him pending in the Circuit Court of the City of Virginia Beach and shall withdraw all requests for any type of affirmative relief that may have been filed by him in any pending case, including before a Commissioner of Accounts regarding the foreclosure accounting and in the unlawful detainer action pending in the General District Court for the City of Virginia Beach."

- "that any permission given Scott by this Court to defend against the foreclosure in Virginia Beach, including any permission given pursuant to this Court's order of January 31, 2008, is withdrawn due to his abuse of the process of the Court and harassment of other persons."

- "that pursuant to Virginia Code § 8.01-271.1, Scott shall pay to petitioners, through their attorney, the sum of $40,330.59 as attorney's fees and costs incurred herein."

- "that the parties shall appear before this Court on Wednesday, November 5, 2008, at 2:00 p.m., to determine whether the Court's rulings contained herein have been met under penalty of criminal sanctions."

October Order, (App. 39-43).

It is well-settled that there are but two types of relief that can be adjudged for contempt, remedial

for the benefit of the complainant or criminal for vindication of the court's authority. A court can make remedial relief conditioned upon the contemnor performing some action required to be performed by the court's contempt order. Principles set forth in three leading opinions of this Court provide guidance on determining whether the relief stated in the October order was remedial or criminal: *Hicks v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988), *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed. 642 (1994) and *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

Filing of this case by Scott was a "completed act of disobedience." *Gompers*, 221 U.S. at 443, 31 S.Ct. at 498. "When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect." *Mine Workers*, 512 U.S. at 830. Scott's "isolated, prohibited act" for which he was found guilty of contempt was his completed act of filing this case. The character of the 2001 order was criminal and prohibitive and Scott's actions violating that order could only have been deemed criminal with attending criminal sanctions.

The sanctions imposed in the October order were not remedial and had no coercive effect under the standards set by this Court in the foregoing and other precedent and, therefore, had the effect of vindicating the authority of the Norfolk Court. Of course, the interveners did benefit from the sanctions imposed, but that should not be the

guiding principle. Ordering Scott to unconditionally dismiss his claims in this case and to withdraw his affirmative requests for relief in the Virginia Beach General District Court and with the Commissioner of Accounts of Virginia Beach were criminal sanctions. *Harris v. City of Philadelphia*, 47 F.3d 1311 (3rd Cir. 1995) (dismissal of motion to modify in civil contempt was criminal sanction); *Hicks v. Feiock*, 485 U.S. at 635, n. 7, 108 S.Ct. at 1431, n. 7 ("The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order.").

It was not insignificant that the Norfolk Court did not make the sanctions it imposed on Scott conditional under a threat of explicitly defined consequences of not doing what the 2001 order required. In other words, the Norfolk Court did not state that Scott's noncompliance with the October order would result in him being jailed or fined until he complied, i.e., the proverbial "carries the keys of his prison in his own pocket" notion articulated in *Gompers*, 221 U.S. at 442, 31 S.Ct. 498. *See* also *Shillitani v. United States*, 384 U.S. 364, 370-71, 86 S.Ct. 1531, 1535-36, 16 L.Ed.2d 622 (1966) (civil contempt is imposed for remedial purpose if court conditions release from imprisonment upon contemnor's willingness to testify) and *United States v. United Mine Workers*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947).

The October order did require the parties to return to the Norfolk Court for it to determine whether Scott had complied with the order "under penalty of criminal sanctions." This requirement did not change the character of the sanctions into remedial sanctions. As a side note, the Norfolk Court at that hearing ***did not*** find that Scott, and certainly not Mrs. Scott, was in violation of the October order because Scott was in the process of filing his motion for nonsuit in the trial court and withdrawing relief requests in the unlawful detainer action and with the Commissioner. Nevertheless, to impose such criminal sanctions for Scott's noncompliance with the October order, the Norfolk Court would have to have found Scott in criminal contempt as a result of a separate proceeding regarding his noncompliance with the October order, not the 2001 order. Therefore, this part of the October order cannot justify the sanctions imposed being classified as remedial and a form of coercing Scott's compliance with the 2001 order.

This distinction impacts this case for three reasons: 1) sanctions imposed in the October order to vindicate the Norfolk Court's authority could not have been enforced by the trial court under its inherent authority or at all without usurping executive branch authority; 2) such sanctions could not be imposed against Mrs. Scott and the trial court could not have found that she was in violation of a criminal order in which she was not named the criminal defendant; and 3) unless and until *Scott* actually "dismiss[ed] all matters filed by him pending in the Circuit Court of the City of Virginia Beach" as required by the October order, he was

(and is to this day technically) subject to a "penalty of criminal sanctions" and the trial court's *sua sponte* dismissal of this case has thrust Scott into perpetual jeopardy of technical noncompliance with the order under continuous "penalty of criminal sanctions." Reliance on the October order by the trial court to dismiss this case was impermissible and effectively denied the Scotts due process and equal protection.

The trial court's final act in finding the Scotts to be in violation of the October order and dismissing the case for that reason in effect imposed a criminal penalty against them with the dismissal for the violation. It is beyond question that the trial court could not take this course of action, particularly against Mrs. Scott who was not a party to the contempt proceeding and was not named in the October order. *See Bessette v. Conkey Company,* 194 U.S. 324, 24 S.Ct. 665, 48 L.Ed. 997 (1904) ("Yet, being no party to the suit [Mrs. Scott] was found guilty of an act in resistance of the order of the court. H[er] case, therefore, comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a court room or disobedience of a subpoena, as among those acts primarily directed against the power of the court.").

Lastly, the trial court should have given the Scotts notice and opportunity to be heard that it was considering them to be in violation of the October order, especially when Scott had already filed his motion to nonsuit the "matters filed by him" (and the motion was opposed by the respondents) and especially when Mrs. Scott was not a party to the

contempt proceeding that led to the October order. The finding that the Scotts were in violation of the October order was an entirely separate matter and dismissal of this case based on that finding was a punitive sanction that should have invoked procedural due process protections accorded criminal proceedings. The trial court did not give the Scotts any notice or opportunity to respond to its consideration of them being in violation of the October order prior to its *sua sponte* finding. The Virginia courts, therefore, denied the Scotts due process. Furthermore, upon the imposition of a criminal sanction against the Scotts after finding *sua* sponte that they were in violation of the October order under inherent authority, "the mode of procedure employed by the [trial] court was such as it might not lawfully adopt." *Evans v. Smyth-Wythe Airport Comm'n*, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998). As a matter of settled Virginia law, the trial court's dismissal order is void *ab initio* and may be "impeached directly or collaterally by all persons, anywhere, at any time, or in any manner." *Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001).

Point 2 **The 2001 Order Imposing The Pre-Filing Injunction Against Scott Violated The Due Process And Equal Protection Clauses Under The Fourteenth Amendment And Was A Prior Restraint That Violated The First Amendment**

A. Due Process Clause

The 2001 order imposing the pre-filing injunction against Scott did not comport with due process and provide Scott with adequate notice. The part of the 2001 order imposing the pre-filing injunction against Scott stated—

> "Michael A. Scott is hereby enjoined from filing any further actions, suits, motions or other proceedings in any Court of this Commonwealth without first obtaining leave of this Court."

The pre-filing injunction part of the 2001 order was vague and ambiguous and the manner in which it was applied to Scott at the request of strangers (interveners) to the original proceeding violated the due process clause and Scott's due process rights. It is clear that this part of the 2001 order was an express prohibition, in the nature of a "criminal" order or criminal statute imposed exclusively to regulate Scott's access to the Virginia courts for any reason whatsoever. *Mine Workers v. Bagwell*, 512 U.S. 821, 835, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); *Hoover v. Wagner*, 47 F.3d 845, 849 (7th Cir. 1995) (noting that "[i]njunctions often do function like statutes."); *Cheffer v. McGregor*, 6 F.3d 705, 708 (11th Cir. 1993), vacated on other grounds, 41 F.3d 1421 (11th Cir. 1994) (en banc) (finding state court injunction to be statutory in character).

The prohibitive character of the 2001 order, to comport with due process, should have "annex[ed] a penalty" or informed Scott of the consequences of violating the order. *Parker v. Commonwealth*, 42 Va. App. 358, 592 S.E.2d 358 (Va. App. 2004) (citing

Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917)). Furthermore, the 2001 order failed to offer any guidance to Scott or to the judges of the Norfolk Court who would interpret the order as to what was meant by and required of Scott by use of the language "without first obtaining leave of this Court." This language was vague, ambiguous and overly broad and its enforcement against Scott at the request of the interveners could not be the basis for a contempt finding. Therefore, the October order finding Scott in civil contempt was void and the final order dismissing this case based on the October order was void. Because the 2001 order was vague, ambiguous and overly broad as applied to Scott, it violated the due process clause and his due process rights.

B. Equal Protection

"The Equal Protection Clause ensures that all persons similarly situated should be treated alike." *Squaw Valley Dev. Co. v. Goldberg,* 375 F.3d 936, 944 (9th Cir. 2004) (Citation omitted). This Court formally recognized a class-of-one equal protection action. *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). As noted, the 2001 order imposing the pre-filing injunction was prohibitory in character and imposed solely to regulate Scott's access to the Virginia courts.

At the time the 2001 order was entered by the Norfolk Court, the law regarding pre-filing injunctions in Virginia was well-settled. The 2001 order "should [have] set forth what [was] enjoined in

a clear and certain manner and its meaning should not be left for speculation or conjecture" and "must be specific in its terms, and it must define the extent of its operation so that there may be compliance." *Unit Owners Ass'n of BuildAmerica-1 v. Gillman*, 223 Va. 752, 770, 292 S.E.2d 378, 387 (1982). The 2001 order, especially the language "without first obtaining leave" without more did not comply with this standard, but Scott was entitled to the application of this standard in imposing, and any enforcement of, the 2001 order against him. *Sylvia Development Corp. v. Calvert County, MD*, 48 F.3d 810 (4th Cir. 1995) (The equal protection clause "requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose."). Therefore, the 2001 order violated the equal protection clause, and as the order was applied to Scott at the request of strangers to the original proceeding to result in the October order, violated his equal protection rights.

C. Prior Restraint

The 2001 order was rendered under the Norfolk Court's equity jurisdiction. The aim of the Norfolk Court was to regulate Scott's ability to file suits in the Virginia courts. However, the 2001 order went way further and impermissibly prohibits Scott from making any filings of any type in any Virginia court, as plaintiff or defendant, in a civil or criminal matter.

A "prior restraint" exists when speech is conditioned upon the prior approval of public

officials. *See, e.g.,* *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S.Ct.1239, 43 L.Ed. 448 (1975) (denial of use of public forum without procedural safeguards is unconstitutional prior restraint). Prior restraints carry a heavy presumption of unconstitutionality. *Batam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

The censorship of Scott's access to Virginia's courts without any guidance provided in the 2001 order as to how to obtain access in a civil or criminal matter, as a plaintiff or defendant, vested in the Norfolk Court judges unbridled and potentially varying discretions of those judges the issue of whether Scott would ever be permitted court access. Needless to say, Scott would be subject to delay in being able to defend himself until he obtained permission to do so. Moreover, the Norfolk Court could not under inherent power restrict Scott's court access in a criminal related matter for any reason without fouling the First Amendment and Fourteenth Amendment.

The character of the 2001 order affecting in any way Scott's ability to effectively defend himself, particularly in a criminal matter, was not such as the Norfolk Court had the power to render under inherent power and is void *ab initio.* Because the 2001 order did not distinguish between civil and criminal matters and prohibits Scott's access to the courts of Virginia as a defendant, the order constitutes a prior restraint that violated the First Amendment and violated the due process clause of the Fourteenth Amendment.

Point 3 **Scott Had A Vested Right And Property Interest In His Being Able To Comply With The October Order**

Whether the sanctions imposed in the October order are characterized as remedial or criminal, Scott had a vested right and property interest in his being able to comply with the order. *Benjamin v. Jacobson*, 124 F.3d 162 (2nd Cir. 1997) (It is well-settled that a final money judgment creates a vested right and hence a constitutionally protected property interest); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805 (11th Cir. 1988) (rights fixed by judgment are, in essence, a form of property); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995); *Cullough v. Commonwealth of Virginia*, 172 U.S. 102, 19 S.Ct. 134, 43 L.Ed 382 (1898); *Morency v. Commonwealth*, 274 Va. 569, 649 S.E.2d 682 (2007). The October order placed Scott's noncompliance under a threat of criminal sanctions which remains to this day because Scott did not "dismiss matters filed by him," but rather the trial court did so without notice or opportunity for hearing on the ground that he and Mrs. Scott were in violation of the October order, thus, depriving Scott of his ability, protected and vested right and duty to comply with the order as written with his motion for nonsuit.

In his attempt to comply with the October order and "dismiss matters filed by him" as specifically required by the order, Scott sought to nonsuit this case pursuant to Virginia Code § 8.01-380. This statute gave Scott the right to nonsuit his case and all of the conditions required by the statute

were met giving him this exclusive right. Nonsuit is a dismissal under Virginia law. *Norwood v. Buffey*, 196 Va. 1051, 1055, 86 S.E.2d 809, 811 (1955) ("A dismissal (not upon the merits) is a nonsuit."). Interpreting § 8.01-380, the Virginia Supreme Court stated: "The election is his and if he insists upon taking the nonsuit within the limitations imposed by the statute, neither the trial court nor opposing counsel can prevent him from doing so." *Nash v. Jewell*, 227 Va. 230, 237, 315 S.E.2d 825, 829 (1984).

If the October order was truly remedial, then the point of the order should have been to restore matters back to the state that existed before Scott filed this case, i.e., when Scott was not in litigation with the respondents in this matter. Scott's attempt to exercise his statutory right to dismiss "matters filed by him" by nonsuiting this case under § 8.01-380 was the only type of equitable dismissal that would "leave[] the situation as if the suit had never been filed" by Scott. *Ipsen v. Moxley*, 49 Va. App. 555, 642 S.E.2d 798 (Va. App. 2007). Scott had no right or authority to dismiss matters filed by Mrs. Scott. *See United States v. International Brotherhood of Teamsters*, 899 F.2d 143 (1990) ("a contempt order [could not] require the contemnor to overstep his lawful authority") and cases cited.

Because Scott's right to nonsuit his case was granted by Virginia statute, this created a constitutionally protected property interest to which he had a "legitimate claim of entitlement." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The trial court, in denying Scott the right to exercise this

protected statutory right, and it's and the Supreme Court of Virginia's failure to apply that Court's settled law noted above to the facts of this case deprived Scott of due process and violated his equal protection rights, and also forced Scott into a perpetual and present inability to comply with the letter of the October order as ordered.

Point 4 **The Trial Court Violated The Scotts Due Process And Equal Protection Rights When It Ruled *Sua Sponte* That They Were In Violation Of The October Order**

The last act of the trial court was to find *sua sponte,* without prior notice or opportunity to be heard, that the Scotts were in violation of the October order and dismissed this case based on that holding. The contempt proceeding against Scott in the Norfolk Court resulted in that Court rendering the October order finding Scott, ***not Mrs. Scott,*** in civil contempt. The 2001 order on which the contempt proceeding against Scott was based enjoined Scott, ***not Mrs. Scott,*** from making filings in the courts of Virginia. Mrs. Scott asserted in this case a claim jointly with Scott related to the Longmont Road property and a claim solo related to the Zephyr property.

Mrs. Scott did not participate in the contempt proceeding and was not given notice of that proceeding. The October order did not mention Mrs. Scott by name or otherwise. Mrs. Scott was not subject to the 2001 order either. When the trial court ruled *sua sponte* that Mrs. Scott was in

violation of the October order, it essentially, by such action, determined that the October order applied to her in effect saying without saying that she was equally responsible for Scott's violation of the 2001 order. Notably, there was no finding by the trial court or by the Norfolk Court that Mrs. Scott violated the 2001 order. "[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930). It appropriately follows that the Norfolk Court in its October order could not bind the order's effect on Mrs. Scott since she was not a party to the contempt proceedings, and it also follows that the trial court's ruling that it was the intent of the October order was beyond its authority to make. In this regard, Mrs. Scott was treated differently than any other litigant with legitimate grievances petitioning Virginia's courts and who has never contravened any court orders or rules or laws of the Commonwealth of Virginia. There was no legitimate governmental interest in denying Mrs. Scott her right to litigate her protected interests just because she happen to petition Virginia's court with such grievances in the same complaint with her husband, Scott, who was ***subsequently*** found to have violated a prior court order. *Village of Willowbrook v. Olech, supra.* As a consequence, Mrs. Scott was denied equal protection by the final actions of the trial court.

Perhaps the most troubling about the trial court's ruling was that it ruled that the Scotts were in violation of the October order *sua sponte* as its final act without notice or opportunity to be heard

given to them by the trial court about being in violation of the order, particularly when the respondents never asked the trial court to make such a finding. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (Due process of law generally requires that a deprivation of property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."). Indeed, it was the final act of the trial court, but especially the actions of the Supreme Court of Virginia in denying the Scotts' petition and petition for rehearing, that raise the specter of the courts' denial of the Scotts' substantive due process rights. In addition, Mrs. Scott was not mentioned by name or otherwise in the October order. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires." *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) (citations omitted).

Mrs. Scott has never been found to have committed any legal wrongs nor anything improper in relation to the October order or the 2001 order prior to the trial court's *sua sponte* final action finding her to be in violation of the October order. *Bacon v. City of Richmond*, 475 F.3d 633 (4th Cir.

2007) (As with any equity case, the nature of the violation determines the scope of the remedy. Remedies, in other words, do not exist in the abstract; rather they flow from and are the consequence of some wrong. At its most basic, this principle limits the reach of judicial decrees to parties found liable for a legal wrong....In sum, a legal violation is a necessary predicate for entry of a remedial order.); *Mylo v. Bd. of Educ. Of Baltimore City*, 948 F.2d 1282 (4th Cir. 1991) (unpublished) (dismissal inappropriate to punish party not responsible for misconduct).

The respondents' objection to nonsuit was directed at Scott's motion for nonsuit of which Mrs. Scott was not a part and never sought to nonsuit her case. The respondents' objection to nonsuit did not specifically request any relief against Mrs. Scott. *Johnson v. Buzzard Island Shooting Club, Inc.*, 232 Va. 32, 37, 348 S.E.2d 220, 223 (1986) (holding that trial court may not grant relief to a party inconsistent with the case alleged in the party's pleading). The trial court invoked inherent power and dismissed Mrs. Scott's case on its own and not based on any specific request for relief from any of the respondents, especially the 3 over whom it never acquired personal jurisdiction, and in so doing, deprived her of due process because it gave neither notice nor opportunity to be heard prior to awarding the respondents that relief.

It is so well-settled in the jurisprudence of this Court and even of the Supreme Court of Virginia that constitutional due process requires notice and opportunity to be heard be given a person before that

person could be deprived of their property interest. *Parish v. Spaulding*, 26 Va. App. 566, 576, 496 S.E.2d 91, 96 (1998) ("Due process requires that, before a court may deprive a party of a property or liberty interest, the party must receive notice and the opportunity to be heard"); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884). Mrs. Scott clearly had a constitutionally protected property interest in her two claims in this case. The trial court's depriving her of these claims based on it applying the October order to bar her claims has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to any governmental interest depriving her of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (The core of the concept of substantive due process is the "protection of the individual against arbitrary action of government," i.e., protection against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective.").

Furthermore, as noted above, only Mrs. Scott filed the claim in this case regarding the Zephyr property. Even if it was appropriate (and it was not) for the trial court to dismiss the claim in which Mrs. Scott jointly filed with Scott, the trial court should not have dismissed the claim related to the Zephyr property, which was against the parties over whom the trial court did not acquire personal jurisdiction and was not a matter filed by Scott. Mrs. Scott was plainly deprived of due process by the trial court's final act of finding *sua sponte* that she was in violation of the October order without giving her

notice that such action was being contemplated and an opportunity to respond before such action was taken. *McManama v. Plunk*, 250 Va. 27, 34, 458 S.E.2d 759 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property."); *Caldwell v. Taggart*, 29 U.S. 190, 4 Pet. 190, 7 L.Ed. 828 (1830).

Pointe 5 **The Trial Court's Final Order Is Void Because It Did Not Have Personal Jurisdiction Over All Of The Necessary Defendants Whose Rights Were Adjudicated By The Final Order**

The respondents invoked the trial court's equity jurisdiction when they filed their objection to Scott's nonsuit. As noted above, neither MERS Corporation, Prime Equity nor Mr. Barcliff appeared before the trial court prior to its final ruling, but each of them was a necessary party whose interests were directly affected by the final order. And yet, the final order dismissed the entire case even in favor of those 3 non-appearing necessary defendants who, because they had not appeared, could not have asked the trial court for such relief. The trial court deprived the Scotts of their due process right to litigate the case against these 3 defendants.

The jurisprudence of this Court and of the Supreme Court of Virginia was well-settled that a court sitting in equity cannot render a valid judgment adjudicating a necessary party's rights unless that court acquired personal jurisdiction over

that party. *Atkinsson v. Wexford Associates*, 254 Va. 449, 455, 493 S.E.2d 524, 527 (1997) ("A court cannot render a valid judgment when necessary parties to the proceedings are not before the court. We have repeatedly articulated this fundamental principle of law."); *Asch v. Friends of Mt. Vernon Yacht Club*, 251 Va. 89, 91, 465 S.E.2d 817, 818 (1996); *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280, 284, 18 L.Ed. 825 (1867). The trial court's final order is void *ab initio* for want of necessary parties—MERS Corporation, Prime Equity and Mr. Barcliff—neither of whom could have possibly requested any relief from the trial court. Finally, the Supreme Court of Virginia's failure to apply its own well-settled principles of law on which the Scotts were entitled to rely violated their substantive due process rights and equal protection rights.

Point 6 **The Scotts Had A Statutory Right To Default Against Certain Petitioners Of Which The Trial Court Deprived Them**

Petitioners US Bank, Wells Fargo Home Mortgage, Wells Fargo Bank, GE Mortgage and DLJ Mortgage failed to timely file responsive pleadings in the trial court, opting instead to pursue the contempt proceeding against Scott in the Norfolk Court. Of course, the corporate interveners did file in the trial court discovery objections while the contempt proceedings were on a separate track in the Norfolk Court. *Maryland Casualty Co. v. Clintwood Bank, Inc.*, 155 Va. 181, 186, 154 S.E. 492, 494 (1930) ("'Any action on the part of defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a

general appearance.'"). Thus, the above-named respondents were required to file responsive pleadings within 21 days of their July 8, 2008 appearance in the trial court whereby they successfully opposed the Scotts' request for injunctive relief. *Virginia Supreme Court Rule 3:8.* The Norfolk Court rejected the interveners' request to stay the proceedings in this case in its August 7, 2008 order granting their motion to intervene. (App. 44-47).

Under Virginia Supreme Court Rule 3:19(a), the above-named respondents' failure to file the responsive pleadings required by Virginia Supreme Court Rule 3:8(a), resulted in their default by automatic operation of this rule. "A defendant who fails timely to file a responsive pleading as prescribed in Rule 3:8 *is* in default." *Virginia Supreme Court Rule 3:19(a).* Emphasis added. As a result, the Scotts became vested with their automatic default as a property interest protected by the due process clause months before the October order was issued. *Board of Regents v. Roth,* 408 U.S. at 577. The trial court denied the Scotts' motion for default at the time of its *sua sponte* dismissal of the case and in so doing denied them both procedural and substantive due process and equal protection.

Point 7 The October Order Was Overly Broad, Vague And Ambiguous And Violated The Due Process Clause

The October order was patently vague, ambiguous and overly broad and the trial court should not have relied on it to base dismissal of this

case. The order required Scott to take the ordered action within 5 days and days 4 and 5 actually fell on the weekend when the trial court was closed for business. Thus, Scott was required to take action he could not take on those two days. The trial court concluded that Scott was in violation of the October order for failing to take action he could not on days 4 and 5 take.

The October order employed numerous vague, ambiguous and overly broad terms such as "dismiss", "all matters filed by him", "pending", "all requests for any type", "any pending case" and "any permission given". Scott had no authority to "dismiss" anything, particularly as to Mrs. Scott's case. Words such as "any" and "all" are patently vague, ambiguous and overly broad terms and the manner in which they were deployed in the October order rendered the entire order vague, ambiguous and overly broad in violation of the due process clause of the Fourteenth Amendment.

CONCLUSION

The issues presented in this petition raise important constitutional questions and questions of law involving this Court's First Amendment and Fourteenth Amendment jurisprudence and jurisprudence relative to a court's exercise of inherent power. It is clear from the foregoing argument that the state's courts violated the Scotts federal and state constitutional rights. Setting aside the state constitutional rights, this is the first and only federal forum in which the Scotts could secure the protection of their federal rights in this case.

For these reasons, the petition for writ of certiorari should be granted. Furthermore, the errors of the lower courts are so clearly against a tide of settled law that summary reversal would be warranted and appropriate in this case.

Respectfully submitted,

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